UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SWANSON PAINTING COMPANY,	)	
Appellant,	)	
vs.	)	NO. 21842
PAINTERS LOCAL UNION NO. 260,	)	
Appellee.	)	

Appeal From The United States District

Court For The District of Montana

Great Falls Division

The Honorable Russell E. Smith, District Judge

APPELLEE'S BRIEF

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Great Falls, Montana 59401

Attorney for Appellee

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INDEX

TABLE OF CASES

TREATISES

STATUTES

STATUTES (Continued) Page

RULES OF PROCEDURE

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I. STATEMENT OF PLEADINGS AND JURISDICTION

Suit was commenced in the United States District Court for the District of Montana, Great Falls Division, by PAINTERS LOCAL UNION NO. 260 against SWANSON PAINTING COMPANY on January 11, 1967. The case is based on Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. 185). Personal service on Swan B. Swanson, President of the Defendant corporation, was made at Woodinville, Washington on January 16, 1967, pursuant to Rule 4 D (3) of the Montana Rules of Civil Procedure, and Rule 4 (e) of the Federal Rules of Civil Procedure. Service was by a United States Marshal. On January 26, 1967, Appellant noticed for hearing a Motion to quash service of process or to change venue. Hearing was held before the District Court on March 14, 1967, and Appellant's Motions were denied.

Thereafter, upon Appellant's request, the District Court certified a substantial ground for difference of opinion and allowed interlocutory appeal pursuant to 28 U.S.C. 1292 (b) and the Appellant perfected its appeal.

Section 301 of the Labor-Management Relations Act of 1947, Subsections (a) and (c), provide as follows:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office; or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

Rule 4 (e) of the Federal Rules of Civil Procedure provides for service upon a party not an inhabitant or found within a state as follows:

"(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Rule 4 B (1) (a) and (e) of the Montana Rules of Civil Procedure provide:

"B. Jurisdiction of Persons.

"(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

"(a) the transaction of any business within this state;

"(e) entering into a contract for services to be rendered or materials to be furnished in this state by such person;"

Rule 4 D (3) of the Montana Rules provides in part:

> "(3) Personal Service Outside the State. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state . . . "

II. ARGUMENT

In its Brief SWANSON raises three issues based on three alleged errors in the District Court's decision: The problem of whether "minimum contact" requirements have been met sufficiently to allow extraterritorial service of process under the Fourteenth Amendment; the problem of applying State Rules of Civil Procedure within a "federal enclave;" and the problem of venue in Montana.

A. There are sufficient "Minimum Contacts" to support application of the Montana "Long-Arm" Statute.

Appellant in its Brief admits that it had a contract to paint 300 housing units and repair 31 carport slabs at Malmstrom Air Force Base near Great Falls, Montana (Tr. Vol. 2, Pg. 6). Appellant further admits that while in Great Falls, Montana, it hired local employees (Tr. Vol. 1, Pg. 3), and, of course, these employees lived in Montana, transported their equipment through Montana, purchased supplies and equipment in Montana, and generally supported their painting operation there. In addition, Plaintiff's Complaint alleges other activities in Montana, particularly in Paragraph VI thereof, where Plaintiff states that SWANSON registered its job with the PAINTERS UNION in Great Falls, Montana.

Under these circumstances, there seems to be little room to argue that there were not "minimum contacts" sufficient to invoke the jurisdiction of Montana under the rule laid down in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057.

The line of cases following International Shoe is well developed in 2 Moore's Federal Practice at page 1165 and following.

To understand the Federal District Court's reluctance to accept SWANSON's position in this case, attention should perhaps be drawn to two recent cases by that Court. In Bullard v. Rhodes Pharmacal Co., 263 F. Supp. 79, decided early in 1967, Judge Smith determined that the activities of a company in Ohio which sold products in Montana with no agent here, but with orders delivered from Chicago, amounted to a sufficient "minimum contact." An even more recent Montana case on "minimum contact" is Continental Oil Co. v. Atwood and Morrell, 265 F. Supp. 692. In it Judge Jameson again upheld the Montana "Long-Arm" statute where a Massachusetts company shipped a manufactured component to Billings, Montana. In that case the Massachusetts company had no Montana agents and the part was ordered by a New York subcontractor. The Massachusetts company was not qualified to do business in Montana and had made no other shipments into Montana, but did know that this shipment went to Montana. Both these Montana cases relied heavily upon the Ninth Circuit case of L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc., 265 F. 2d 768, and applied the "reasonableness" tests set forth in that case:

> "(1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.
>
> "(2) The cause of action must be one which arises out of, results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'
>
> "(3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of 'fair play' and 'substantial justice.' If

> this test is fulfilled, there exists a 'substantial minimum contact' between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens."

Rule One would seemingly be met in our case because SWANSON painted houses within the forum; Rule Two is met because the cause of action arises from breach of a labor contract which directly concerned SWANSON's painting in Montana, and by its hiring in Montana; Rule Three should be met because, having come into Montana and spent an entire summer painting here, it does not seem unfair or unreasonable to subject SWANSON to Montana jurisdiction.

Appellant's Brief indicates that perhaps it does not intend to seriously contend that there were insufficient minimum contacts, because Appellant seems to base its jurisdictional argument upon the contention that its work was performed exclusively on the Air Base. Ignoring for the moment the fact that all of its contacts were not exclusively on the Air Base, it would seem that Appellant misconstrues Rule 4 (e) of the Federal Rules of Civil Procedure when it tries to avoid the Rule because the work was on a "federal enclave." Rule 4 (e) merely says that a Federal Court shall use the local method of service when the Court sits in a State which has such a local method. Jurisdiction derives from the Federal Statute; the State of Montana also has jurisdiction because the Appellant transacted business and entered into a contract for services to be rendered in Montana. But the application of Rule 4 (e) concerning service should only depend on the fact that the state in which the Federal Court sits has a "Long-Arm" Statute, not whether the work was done on or off a federal enclave.

B. The Federal Enclave Problem.

Appellant argues in its Brief that it should escape jurisdiction in Montana because the bulk of its contract was performed on Malmstrom Air

Force Base. The two cases cited in Appellant's Brief do not sustain its position. They actually sustain Appellee's position because even here SWANSON PAINTING COMPANY carried on substantial activities within Montana and off the Air Base (hiring; registering with the Union).

But, more important, Appellant's contentions about the application of Article I, Section 8, Clause 17 of the Federal Constitution have not been sustained by the Courts. Granting that the Federal Constitution contains the language quoted in Appellant's Brief concerning "exclusive" jurisdiction over places "purchased by the consent of the Legislature of the State in which the same shall be," Appellant has overlooked the significance of the Legislative consent required. In James v. Dravo Contracting Co., 302 U.S. 134, 58 Sup. Ct. 208, 114 A.L.R. 318, the United States Supreme Court held that states can qualify sales of land to the United States so as to retain jurisdiction. The respondent in that case had raised the same Constitutional issue which Appellant raises here. The Court said:

> "Respondent contends that by virtue of Article 1, Section 8, Clause 17, of the Federal Constitution the United States acquired exclusive jurisdiction.
>
> "Clause 17 provides that Congress shall have power 'to exercise exclusive legislation' over 'all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.' 'Exclusive legislation' is consistent only with exclusive jurisdiction. Surplus Trading Co. v. Cook, supra (281 U.S. 652, 74 L. ed. 1095, 50 S. Ct. 455). As we said in that case, it is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. The lands 'remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.' Id., p. 650. Clause 17 governs those cases where the United States acquires lands with the consent of the legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is,

consistently with the carrying out of the purpose of the acquisition, determine the extent of the Federal jurisdiction." (Citing cases.)

The State of Montana in its General Cession Statute, 83-108 R.C.M. (1947), has provided reservations for civil and criminal jurisdiction:

> "Jurisdiction over lands purchased by United States. Pursuant to Article 1, Section 8, Paragraph 17 of the Constitution of the United States, consent to purchase is hereby given, and exclusive jurisdiction ceded, to the United States over and with respect to any lands within the limits of this state, which shall be acquired by the complete purchase by the United States for any of the purposes described in said paragraph of the Constitution of the United States, said jurisdiction to continue as long as said lands are held and occupied by the United States for said purposes; reserving, however, to this State the right to serve and execute civil or criminal process lawfully issued by the courts of the State, within the limits of the territory over which jurisdiction is ceded in any suits or transactions for or on account of any rights obtained, obligations incurred, or crimes committed in this State, within or without such territory; . . . "

The reservations by Montana of jurisdiction "in any suits or transactions for or on account of any rights obtained, obligations incurred" would seem to be a broad enough reservation of jurisdiction to encompass the civil acts involved in this case. This reservation is different from the reservation contained in the statutes ceding land for Yellowstone and Glacier Parks (83-104 and 83-106, R.C.M. 1947). These statutes reserve criminal jurisdiction and process for crimes committed "outside" such Parks. But the general cession statute contains the phrase "within or without such territory," indicating that the jurisdiction is reserved even on the Air Base itself.

Historically, it should be noted that the cession statute referred to above was amended in 1939, when the present reservation was added and the words "within or without such territory" were added. Malmstrom Air Force Base was purchased since 1939.

The Montana Supreme Court, in State v. Rindal, 404 P. 2d 327, has interpreted the cession statute as applied to missile sites owned by

the Federal Government in conjunction with Malmstrom Air Force Base in Montana. The Supreme Court held that, as amended, the statute allowed the State to exercise criminal jurisdiction over offenses committed inside the territory as well as outside and removed any doubt about State criminal jurisdiction over such lands. The issue was also raised before the Montana Supreme Court in State v. District Court, 410 P. 2d 459, a 1966 case, where a defendant sought a Writ of Prohibition to avoid criminal prosecution for a crime committed on Malmstrom Air Force Base. The Montana Supreme Court quoted the Dravo case and then specifically applied the reservation contained in the Montana cession statute to Malmstrom Air Force Base for criminal jurisdiction. In Parker v. State, Opinion dated April 21, 1966, 23 State Reporter 344, an application for a Writ of Habeas Corpus was presented to the Federal District Court concerning the same matter, and that Court sustained the State jurisdiction over Malmstrom Air Force Base. The District Court pointed out that the War Department, in accepting jurisdiction (40 U.S.C. 255) specifically referred to Section 83-108, R.C.M. 1947, and that the United States has never objected to the retention of jurisdiction by the State. It would seem that the reservation under the cession statute is broad enough to cover civil causes in the same manner in which these Courts have held State jurisdiction extends to the Air Base for criminal matters.

C. Venue For This Case is Properly Laid in Montana

PAINTERS LOCAL UNION NO. 260 contends that Section 301 of the Labor-Management Relations Act (29 U.S.C. 185) is itself a venue statute. Subsection (a) of this statute states that suits for violation of contract between an employer and a labor organization "may be brought in any District Court of the United States having jurisdiction of the parties . . . " This broad language would seem to be sufficient to sustain the bringing

of the action in the Federal Court in Montana. Section 301 is a part of our broad national labor policy and is a special statute granting a special right to sue on labor contracts. That such suit should be brought in the jurisdiction in which the work takes place and the contract is applicable would seem sensible from the point of view of convenience of witnesses and ease of trial. Appellant wishes to ignore the plain language of Section 301 and depend on the general venue statutes in an attempt to move the case out of the Montana jurisdiction.

Appellee is concerned that such a move out of the Montana jurisdiction not only would be inconvenient, but might divest the PAINTERS union of its right to bring any action against SWANSON PAINTING COMPANY because of Subsection (c) of Section 301. This Section provides that for purposes of actions by labor organizations, the District Court shall have jurisdiction over labor organizations only "(1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." PAINTERS LOCAL UNION NO. 260 does not maintain any office in the State of Washington and does not have any officers or agents acting there, so conceivably it would have no right to bring an action against the SWANSON PAINTING COMPANY in the State of Washington. Appellee thus fears that it will lose its entire remedy unless Subsection (a) of Section 301 means that the action may be brought in "any District Court."

Appellant has quoted International Association of Machinists v. Smiley, 76 F. Supp 800, concerning where venue lies. It should perhaps be pointed out that Appellee here does not depend on Subsection (c) to grant venue in Montana, but rather upon Subsection (a) of Section 301. The Machinists case deals only with the interpretation of Subsection 301 (c).

The case was not even between an employer and a union. It is inapplicable here.

Appellant depends upon the general venue statute, 28 U.S.C. 1391, and particularly Subsection (b). This subsection, of course, contains a reservation "except as otherwise provided by law" which would make it ineffective in the face of Section 301, or, for that matter, in the face of Section 28 U.S.C. 1391 (c):

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Had SWANSON PAINTING COMPANY been licensed to do business in Montana, it clearly would have been subject to Montana jurisdiction. Apparently Appellant claims that by its failure to follow the provisions of the Montana Corporation Code, Section 15-1701, R.C.M. 1947, requiring all foreign corporations to file before doing business within the State, it somehow achieves immunity from State jurisdiction. A companion Section, 15-1702, requires the appointment of an agent for service of process, and Section 15-1703 provides that such foreign corporations who have failed to file cannot enforce their contracts in Montana. Appellee feels that Appellant should be estopped to deny its presence in Montana where it must depend upon the violation of the Montana Corporation Code to maintain this position. L'Heureux v. Central American Airways, 209 F. Supp. 713.

More important, however, is the phrase in 1391 (c) that a corporation may be sued in any judicial district in which it is "doing business." Appellant contends in its brief that the "better reasoned cases" hold that "doing business" refers to business being done at the time of service of process. It quotes Satterfield v. Lehigh Valley Railway Company, 128 F. Supp. 669. But that was a case concerned with whether there were enough "contacts" with the State to justify jurisdiction. The Court

did not even discuss whether the time of "doing business" was the time that the cause of action arose or the time that the service took place. The quotation in Appellant's Brief merely happened fortuitously to state the problem in terms of time of service. Appellant also quotes Brenner v. Rubin and Hall v. Rubin, 240 F. Supp. 467 and 470 respectively. But these are cases involving service of process, not venue. The Court does discuss Section 1391 (b) concerning venue, but that is not the Section Appellee depends on in this case. Again, Powell v. Sealectro, Inc., 205 F. Supp 6, quoted by Appellant is a case involving whether there are sufficient "contacts" rather than a case involving what time the Defendant must be "doing business." None of Appellant's cases support its proposition.

On the other hand, there are well reasoned opinions to the effect that the time of "doing business" is the time that the cause of action arises. See, for example, Nelson v. Victory Elec. Works, Inc., 210 F. Supp. 954. In that case the Court quotes from Chief Judge Thomsen in the case of L'Heureux v. Central American Airways, Supra, as follows:

> " * * * the purpose of Congress in enacting Sec. 1391 (c) can be fully achieved only if foreign corporations--both those which qualify to do business and those which do not qualify--can be sued in the federal court in actions arising out of business done in the state and district where the suit is filed. I believe Congress intended that the venue requirements of Sec. 1391 (c) may be satisfied by showing that the defendant was doing business in the district at the time the cause of action arose, and that the cause of action arose out of that business. Those facts are alleged in the complaint in this case, and are not disputed. The motion to dismiss, therefore, must be denied."

Then the Court goes even further than the decision in L'Heureux:

> "(2, 3) We agree with the reasoning and conclusions expressed in the L'Heureux case. However, we believe a somewhat more extreme construction of Section 1391 (c) is warranted. In cases such as the instant one, arising out of a foreign corporation's business in the state and district in which suit is filed, such foreign corporation should be deemed to be 'doing business' within the meaning of Section 1391 (c), if the corporation is amenable to service of process under the appropriate state statutes and if the minimal constitutional standards of the International Shoe case, supra, are met. This construction of the 'doing business'

clause was implicit in the decision of this court (per Watkins, D.J.) in Wanamaker v. Lewis, D.C., 153 F. Supp. 195 (1957), and its reasonableness seems obvious. 'If it is not unfair to subject the corporation to the court's jurisdiction by service of process, it seems wise and not unfair to hold that there is a proper venue, particularly when the case can be transferred to another venue, if convenience warrants.' 1 Moore's Federal Practice, Par. 0.142(5.-3.), P. 1501 (2nd ed. 1961). Admittedly, this holding in the case of foreign corporations, goes a long way toward making the standards regarding venue coincident with those regarding in personam jurisdiction. Yet, Congress in exacting Section 1391 (c) clearly was striving toward this very end."

Moore, in Volume 1, Paragraph 0.142 (5.-3.), on page 1499, says:

"We believe that the construction of Section 1391 (c) involves a Federal matter; that state law is not controlling; and uniformity in applying Section 1391 (c) is desirable. And, although the matter is not free from doubt, and there is very respectable contra authority, we believe that if a corporation is amenable to service of process it should be held to be 'doing business' for venue purposes."

In Farmers Elevator Mutual Insurance Co. v. Austad and Sons, Inc., 343 F. 2d 7, the Eight Circuit also quoted the L'Heureux case;

"We agree and are likewise in accord with the view that the purpose of Congress can be fully achieved only if foreign corporations--those that qualify and those which do not--can be sued in the federal court in actions arising out of business transacted in the state and district where the suit is filed. We believe and hold that Congress intended that the venue requirements of Section 1391 (c) are satisfied by showing that the defendant corporation was doing business in the district at the time the cause of action arose."

In Snyder v. Eastern Auto Distributors, 357 F. 2d, 552, the Fourth Circuit held that withdrawal of the Defendant from the State did not dislodge venue, because the time at which it was to be doing business was the time when the cause of action arose. In the Snyder case the Fourth Circuit raised the point that "for a reasonable time" after a corporation ceased actually doing business, the venue should still remain where it had done business when the cause of action arose. The case of Sharp v. Commercial Solvent Corp., 232 F. Supp. 323, came to a like result, and again the Court said that venue would remain where the company had done